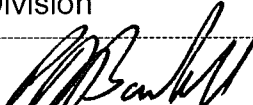




Hamilton

INFORMATION REPORT

TO: Mayor and Members Board of Health	WARD(S) AFFECTED: CITY WIDE
COMMITTEE DATE: February 28, 2011	
SUBJECT/REPORT NO: 11-001 Legionella: Cooling Tower Registry By-law (City Wide)	
SUBMITTED BY: Peter A. Barkwell, City Solicitor Legal Services Division	PREPARED BY: Lisa Pasternak, Senior Solicitor 905-546-2424 ext 7292
SIGNATURE: 	

Council Direction:

Board of Health, at its meeting of January 24, 2011, directed that Report BOH0921(b) – Legionella: Cooling Tower Registry By-law be tabled until next month's meeting, in order to allow legal staff to provide input on the wording of the proposed by-law.

Information:

Members of the Board of Health were concerned about the use of discretionary wording, "may", in enforcement provisions of the proposed Cooling Tower Registry By-law.

Enforcement is not possible without discretion. Wording authorizing enforcement is, as a rule, discretionary, because the circumstances under which enforcement takes place vary greatly and those enforcing must be able to choose which of the tools available to them to use.

For example, under the proposed Cooling Tower Registry By-law, an Officer may be satisfied that there has been a contravention with respect to record-keeping, but also satisfied that the contravention has ceased because compliant records are being submitted regularly. In this case, neither a section 18 order to cease nor a section 20 order to do work applies.

SUBJECT: Cooling Tower (City Wide) SUBJECT:

Even the section 17 authority to inspect after a court order has been obtained may not be exercised if the owner decides to cooperate.

Usually a number of enforcement options are available - for example, orders to cease or do work, a charge, or even injunctive relief - and staff must be able to choose amongst them to achieve the best result. In many instances, there will be compliance without resorting to any of these options. If public health is threatened, staff will take immediate action under the Health Protection and Promotion Act.

In addition, with few exceptions, by-law provisions, and especially enforcement provisions, should not be worded so as to bind the City. The City's exposure to liability is much greater when accused of failing to meet a responsibility under a mandatory provision than under a discretionary provision.

In light of the above, it is not surprising that enforcement provisions in federal, provincial and municipal legislation are rarely mandatory. Some examples of similar order-making enforcement provisions from all three levels of government are set out below:

Federal - Canada Wildlife Act

Compliance order

11.7 (1) Whenever, during the course of an inspection or a search, a wildlife officer has reasonable grounds to believe that any provision of this Act or the regulations has been contravened by a person who is continuing the commission of the offence, or that any of those provisions are likely to be contravened, the wildlife officer may issue a compliance order directing any person who causes or contributes to the alleged contravention, or who is likely to do so, to take any of the measures referred to in subsection (2) that are reasonable in the circumstances and consistent with wildlife conservation and public safety in order to cease or refrain from committing the alleged contravention.

Provincial - Health Protection and Promotion Act

Order by M.O.H. or public health inspector re health hazard

SUBJECT: Cooling Tower (City Wide) SUBJECT:

13. (1) A medical officer of health or a public health inspector, in the circumstances mentioned in subsection (2), by a written order may require a person to take or to refrain from taking any action that is specified in the order in respect of a health hazard. R.S.O. 1990, c. H.7, s. 13 (1).

Condition precedent to order

(2) A medical officer of health or a public health inspector may make an order under this section where he or she is of the opinion, upon reasonable and probable grounds,

(a) that a health hazard exists in the health unit served by him or her; and

(b) that the requirements specified in the order are necessary in order to decrease the effect of or to eliminate the health hazard. R.S.O. 1990, c. H.7, s. 13 (2).

Municipal - City of Mississauga - Open Air Fires By-law

13. A Firefighter may order a fire to be extinguished immediately if the fire:

(1) is not set in compliance with this by-law; or

(2) is determined upon inspection by the Firefighter to constitute a safety hazard

or concern.